UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RANDY CAMPBELL,	)	
	)	
Plaintiff	)	
v.	)	Civ. No. 97-251-B
	)	
IRVING OIL CORPORATION,	)	
	)	
Defendant	)	

ORDER DENYING MOTION TO DISMISS

BRODY, District Judge

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant, Irving Oil Corporation ("Irving"), brings this motion to dismiss the Complaint of Plaintiff, Randy Campbell, for failure to state a claim upon which relief can be granted. Plaintiff asserts that Defendant engaged in an illegal tying arrangement in violation of 15 U.S.C. § 1 et seq. Plaintiff also asserts a variety of state law claims against Defendant.[1] For the reasons set forth below, Defendant's Motion to Dismiss is DENIED.

BACKGROUND

Defendant, a Maine corporation with its principal place of business in Bangor, Maine, has established a network of gasoline service stations, convenience stores and truck and travel stops in Maine and elsewhere. While some of these truck and travel stops are owned and operated by Defendant, others are operated by independent franchisees.

[1] Plaintiff alleges the following state law claims in addition to his federal antitrust claim in Count I: violation of the Maine Anti-Trust Act, 10 M.R.S.A. § 1101 et seq. (Count II); violation of the Regulations of the Sale of Business Opportunities, 32 M.R.S.A. § 4691 et seq. (Count III); breach of the express and implied covenants of peaceable and exclusive possession (Count IV); breach of the lease/franchise agreement between Plaintiff and Defendant (Count V); and wrongful termination of the lease/franchise agreement between Plaintiff and Defendant (Count VI).

During the time period relevant to this dispute, Defendant owned a gas station/truck stop/restaurant on Interstate 95 in Houlton, operated under the name "Irving Big Stop" (the "Houlton 'Big Stop'"). Prior to February 22, 1995, Defendant operated the Houlton "Big Stop." On or about February 22, 1995, Plaintiff and Defendant executed a lease agreement (the "Agreement"), whereby Plaintiff began to operate the restaurant portion of the Houlton "Big Stop," and was granted a non-exclusive license of the "Big Stop" trademark and trade name, subject to a number of conditions set forth in the Agreement.

Contemporaneously with the execution of the Agreement, Plaintiff and Defendant executed the Irving Oil Restaurant Lease Operating Standards Manual (the "Standards Manual"), which was incorporated into the Agreement by reference. The Standards Manual placed certain obligations and duties upon Plaintiff in the operation of the Houlton "Big Stop" restaurant. In particular, Section 2.6 of the Standards Manual allowed Plaintiff to purchase inventory, equipment, and supplies of his own choosing, provided that such products "meet reasonably high quality standards . . . and [ ] be appropriate to and not detract from Lessee's or Lessor's business." Standards Manual § 2.6. Based upon these standards, Defendant reserved the right to approve all purchases and supplies.

Plaintiff contends that Defendant never articulated product specifications which would satisfy the "reasonably high quality" standards, and instead "required or pressured Plaintiff to the point of compelling him to purchase, through a designated supplier, Irving brand or Irving controlled napkins, dishes, paper goods, french fries, and coffee, and to use certain selected vendors/suppliers for the inventory and supplies necessary to conduct the restaurant business." Compl. at ¶ 15. Plaintiff argues that this pressure to purchase certain supplies was enhanced by a

series of inspections, conducted by Defendant's agents, which evaluated, among other things, whether or not each franchisee was using "Approved Products (Suppliers)." Failure to comply with the quality standards set forth in the Manual constituted grounds for immediate termination of Plaintiff's lease without notice. Plaintiff asserts that his inability to negotiate with suppliers of his choice in the open, competitive market increased his costs significantly beyond what he otherwise would have incurred.

MOTION TO DISMISS

In assessing a Motion to Dismiss brought pursuant to Fed. R. Civ. P. 12(b)(6) the Court takes all of Plaintiff's factual averments as true and indulges every reasonable inference in Plaintiff's favor. Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996). The Court may grant Defendant's Motion to Dismiss "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990). The Court may consider a Rule 12(b)(6) motion to dismiss brought after Defendant has filed its answer, if, as done here, Defendant raises the failure to state a claim as an affirmative defense in its Answer and Amended Answer. See Gerakaris v. Champagne, 913 F. Supp. 646, 650-51 (D. Mass. 1996).

DISCUSSION

In Count I, Plaintiff alleges that Defendant's conduct constitutes an illegal tying arrangement in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451,

461 (1992) (quoting Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958)). Plaintiff's Complaint articulates a "per se" theory of tying liability, rather than a "rule of reason" theory of tying liability. In order to succeed on a "per se" tying claim, a plaintiff must establish that:

> (1) the tying and the tied products are actually two distinct products; (2) there is an agreement or condition, express or implied, that establishes a tie; (3) the entity accused of tying has sufficient economic power in the market for the tying product to distort consumers' choices with respect to the tied product; and (4) the tie forecloses a substantial amount of commerce in the market for the tied product.

Borschow Hosp. & Med. Supplies, Inc. v. Cesar Castillo, Inc., 96 F.3d 10, 17 (1st Cir. 1996) (quoting Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1178-79 (1st Cir. 1994)). Because not every tying arrangement is illegal, determining whether a particular product "tie" is anti-competitive may "require a 'fairly subtle antitrust analysis' of 'market power,' a fact-sensitive inquiry aimed at winnowing out only those ties most likely to threaten anti-competitive harm." Lee v. Life Insurance Co. of North America, 23 F.3d 14, 16 (1st Cir. 1994) (quoting Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794-96 (1st Cir. 1988)).

The Court is persuaded that Plaintiff's Complaint contains sufficient factual allegations raising disputed material facts to withstand Defendant's Motion to Dismiss at this stage of the proceedings. While Plaintiff's Complaint does not explicitly define the "tying" product and the "tied" product, the allegations in his Complaint together with his Memorandum in Opposition to Defendant's Motion to Dismiss indicate that he considers the tying product to be truck stops along the Interstate-95 corridor, and the "tied" product to be the supplies necessary to provide food at these truck stops, including, "napkins, dishes, paper goods, french fries, and coffee." The Court finds these two products to be distinct, "i.e. that each is distinguishable by consumers in

the relevant market, and that there would be sufficient consumer demand for each individual product, and not merely as part of an integrated product 'package.'" Lee, 23 F.3d at 17 n.6. Defendant does not dispute that Plaintiff has sufficiently alleged the existence of a tie between these two products.

Plaintiff also alleges that Defendant, through its "Big Stop" trademark and method of doing business "has gained market eminence" in the relevant market for the tying product. See Compl. at ¶ 10. Plaintiff does not contend that the relevant market is limited to "Big Stop" truck stops. Rather, Plaintiff contends that Defendant has market power in the larger market for truck stops along the Interstate-95 corridor. In general, "proper market definition . . . can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." Eastman Kodak Co., 504 U.S. at 482.[2] Therefore, while Defendant may dispute Plaintiff's definition of the relevant market for the tying product and Plaintiff's contentions about Defendant's eminence in this market, the Court is reluctant to decide these disputes on the current state of the record. Finally, Plaintiff has sufficiently alleged that Defendant's conduct affected a substantial amount of commerce in the tied product market, by asserting that he was unable to negotiate with other suppliers and that the suppliers approved by Defendant charged higher prices than those available in the open market.

"[T]he essential characteristic of an invalid tying arrangement lies in the seller's

[2] Defendant anticipates in its memoranda that Plaintiff will argue, based on the Supreme Court's reasoning in Eastman Kodak Co., 504 U.S. 451, that even if Defendant lacks market power in the relevant market for the tying product, Defendant might still be able to create an unlawful "tie" because of "information" and "switching" costs associated with the franchise agreement. Because Plaintiff alleges that Defendant has market power in the relevant market for the tying product, the Court does not address, at this stage of the proceedings, Defendant's argument that this type of "lock-in" is not applicable to the circumstances of this case.

exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere on different terms." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984). Defendant has failed to satisfy its burden of demonstrating that, according to the facts alleged by Plaintiff, Plaintiff cannot recover on his unlawful tying claim. The Court, therefore, denies Defendant's Motion to Dismiss with respect to Count I.

Since Defendant provides no basis for rejecting Plaintiff's remaining state law claims other than its argument that these state claims should be dismissed if the Court rejects Plaintiff's federal claim, the Court denies Defendant's Motion to Dismiss with respect to Counts II-VI as well.

SO ORDERED.

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MORTON A. BRODY
United States District Judge

Dated this ____ day of May, 1998.